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# Employment Law Dilemmas: What to Do When the Law Forbids Compliance

*Steven C. Bednar\**

## I. INTRODUCTION

The 1990's have seen the passage of significant employment legislation. The Americans With Disabilities Act,<sup>1</sup> the Civil Rights Act of 1991,<sup>2</sup> the Family and Medical Leave Act,<sup>3</sup> the Uniformed Services Employment and Reemployment Rights Act,<sup>4</sup> and most recently the Health Insurance Portability and Accountability Act,<sup>5</sup> have all recently appeared in an already dense constellation of employment-related legislation. Congress, state legislatures, and the courts have now created a complex galaxy of employment laws which not only overlap, but frequently impose confusing and sometimes conflicting obligations. As the obligations and prohibitions on employers increase, the path of legal compliance becomes precariously narrow. In some instances, there is no path left at all. In these situations, employers find themselves in double-bind dilemmas — the "Catch 22's" of the law. The action necessary to comply with one law, if done incorrectly, could violate another.

This article reviews several examples of situations where compliance with one employment regulation enhances the risk of violating another. In many instances, the problem is created by the existence of an employment statute which specifically authorizes conduct which is prohibited by the common law or another statute. Now, more than ever, human resource managers and employment law attorneys are required to view the world of employment regulations with a broad perspective that understands that caution in one area of employment law may constitute carelessness in

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\* Copyright © 1997 Steven C. Bednar & CLE International. A prior version was presented at CLE International's Handbook Conference, June 26-27, 1997 in Salt Lake City, Utah. Mr. Bednar is a partner in the firm of Manning Curtis Bradshaw & Bednar, LLC in Salt Lake City, Utah. J.D., 1990, J. Reuben Clark Law School, Brigham Young University.

1. 42 U.S.C. §§ 12101-12213 (1994).

2. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C.).

3. Family and Medical Leave Act, Pub. L. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C.).

4. Uniformed Services Employment and Reemployment Rights Act, Pub. L. 103-353, 108 Stat. 3149 (codified as amended in scattered provisions of 5 U.S.C. and 38 U.S.C.).

5. Health Insurance Portability and Accountability Act, Pub. L. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C. and 42 U.S.C.).

another. As human resource managers slow down to carefully navigate the traffic of congested employment laws in front of them, they must realize the greatest vulnerability is being hit from behind.

## II. THE QUAGMIRE OF COMPETING EMPLOYMENT REGULATIONS

The text below reviews several employment statutes and common law obligations of employers which create conflicting and sometimes incompatible obligations. A review of the general statutory or common law scheme of each area of regulation is beyond the purview of this article. The materials are limited to a brief discussion of the requirements between topically related statutes or between a particular statute and the common law and suggestions as to how to remain on the narrowing path of compliance.

### A. *Title VII Restrictions on Criminal Background Checks vs. Negligent Employment Torts*

Title VII of the Civil Rights Act of 1964<sup>6</sup> imposes significant restrictions on an employer's ability to use criminal background information in the hiring process. These restrictions arise from the fact that disqualification based upon the existence of a criminal record tends to have a disparate impact on one or more of the classes protected under Title VII. In contrast, the common law imposes a duty to exercise care to ensure against hiring an applicant who the employer knows or should know may engage in violent or injurious conduct. Failure to exercise the required degree of care in hiring, which often requires an evaluation of criminal background information, can result in liability for negligent employment. Employers are thus faced with the dilemma of discharging their common law obligation in order to gather necessary background information without violating the statutory restrictions of Title VII as to how such information is used.

#### 1. *Ensuring Compliance With Title VII's Restrictions*

Title VII restricts the use of criminal background information in the hiring process. For example, an *arrest* is not conclusive of any wrongdoing. Therefore, absent a strong showing of "business necessity," considering an arrest record in connection with an application for employment violates Title VII.<sup>7</sup> Most Equal Employment Opportunity Commission

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6. 42 U.S.C. §§ 2000e-1 to -17 (1994).

7. *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1971).

("EEOC") decisions acknowledge the possibility of a "business necessity" defense. However, this defense has been rejected in each of the numerous reported decisions in which it has been asserted. Even an employee bonding requirement has been rejected as a "business necessity" justifying an arrest-based disqualification of a minority applicant.<sup>8</sup> As a result, consideration of an arrest record in the hiring process is, as a practical matter, illegal per se.

It should be noted, however, that inquiring into an arrest record on an employment application does not itself violate Title VII. An employee who fails to disclose an arrest may be validly disqualified based upon falsification of information on the application.<sup>9</sup> However, the practice of inquiring into arrest records on an employment application is a dangerous one because if an arrest is disclosed, it requires the employer to explain why it required disclosure of the arrest if such information is immaterial to the employer's hiring decisions.

Title VII does not prohibit an employer from requiring job applicants to disclose criminal *convictions*, whether *misdemeanor or felony*. However, as applied by the EEOC, Title VII does not permit a criminal conviction to serve as an *automatic* bar to employment. To satisfy Title VII, a conviction-based disqualification must be justified by "business necessity."<sup>10</sup> The "business necessity" standard is applied more leniently in the context of convictions as opposed to arrests. To determine if this standard is satisfied, EEOC decisions require the following factors to be considered: (1) the job-relatedness of each conviction; (2) the nature of the conviction; (3) the number of convictions; (4) the facts surrounding each offense; (5) the length of time between the conviction and the employment decision; (6) the applicant's employment history before and after the conviction; and (7) the applicant's efforts at rehabilitation.<sup>11</sup> Of these factors, job-relatedness is by far the most critical.<sup>12</sup> EEOC decisions illustrate that the job-relatedness inquiry focuses on whether the job position applied for presents an opportunity for the applicant to engage in the same type of misconduct which resulted in the applicant's conviction.

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8. See EEOC Decision No. 74-92 (1974).

9. See *Jimerson v. Kisco Co.*, 404 F. Supp. 338 (Dist. Ct. Mo. 1975), *aff'd*, 554 F.2d 1008 (8th Cir. 1975).

10. EEOC Decision No. 80-28 (1980).

11. See EEOC Decision Nos. 81-15 (1981); 77-30 (1978); 78-110 (1977); 77-3 (1976); 75-199 (1975); 75-108 (1974).

12. See EEOC Decision No. 80-20 (1980).

## 2. *Negligent Employment Torts: Satisfying Common Law Obligations*

Under Utah law, an employer may incur liability for negligent employment when "(I) [the employer] knew or should have known that its employees posed a foreseeable risk . . . to third parties, including fellow employees; (ii) the employees did indeed inflict such harm; and (iii) the employer's negligence in hiring, supervising, or retaining the employees proximately caused the injury."<sup>13</sup> In a negligent employment claim, the most important element in determining whether an employer breached its duty of care in hiring is the element of foreseeability. An employer who fails to obtain information in the hiring process which would have disclosed that a risk of injurious conduct by the employee was foreseeable may incur liability for negligent hiring if the type of harm which would have been foreseen is realized. Thus, an employer must make reasonable efforts to ensure that it does not hire an applicant who the employer knows *or should* know has a propensity to violence or other misconduct. In many instances, "reasonable efforts" include such things as a criminal background check.

The existence of a duty to conduct a criminal background check varies depending on the nature of the job at issue. For example, a job in which an employee will have regular contact with customers or fellow employees may require more careful pre-employment screening than a job in which an employee will have little or no contact with third parties.<sup>14</sup> In determining whether a criminal background check is required to discharge an employer's common law obligation, the practice of obtaining criminal background checks in the particular industry involved is relevant.<sup>15</sup>

## 3. *Title VII vs. Negligent Employment: What to Do*

The statutory restrictions of Title VII limiting the use of criminal background information on the one hand and the common law obligations relating to negligent employment torts on the other create a narrow path

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13. *Retherford v. AT&T Comm. of the Mountain States, Inc.*, 844 P.2d 949, 973 (Utah 1992); *see also C.C. v. Roadrunner Trucking Co.*, 823 F. Supp. 913, 922 (D. Utah 1993).

14. *See, e.g., J. H. by D.H. v. West Valley City*, 840 P.2d 115, 125 (Utah 1992) (city must hire and maintain police officers with "demonstrated mental fitness and integrity" because the officers are given "a high degree of authority" and "regularly have one-on-one contact with private citizens").

15. *See, e.g., Stone v. Hurst Lumber Co.*, 386 P.2d 910, 911-12 (Utah 1963) (plaintiff presented no evidence that it was necessary or *customary* to make a more detailed investigation for the type of work for which the employee was hired); *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913, 923 (D. Utah 1993) (defendant trucking company did not need to conduct a criminal background check on its drivers in part because it is not the general practice in the trucking industry to perform such checks).

of compliance for employers. The following suggestions should be considered in traversing this narrow path:

- Require disclosure of *all convictions* on employment applications — do not limit the inquiry to felony convictions.
- Carefully consider the “job-relatedness” of any conviction before disqualifying the applicant.
- If you are a “Qualifying Entity” under section 53-5-202(8) of the Utah Code, obtain consolidated criminal history record information from the Law Enforcement and Technical Services Division. Qualifying entities include businesses that involve: “(a) national security interests; (b) care, custody or control of children; © fiduciary trusts over money; or (d) vulnerable adults.”<sup>16</sup>
- If you hire someone with a conviction, whether misdemeanor or felony, avoid circumstances which create a risk of the type of harm foreseeable from the information known.

### *B. Fair Credit Reporting Act vs. Title VII*

Employers frequently find credit information helpful in evaluating job applicants. To determine the permissibility of considering credit information, the obvious place to look is the Fair Credit Reporting Act, which specifically allows employers to obtain a “consumer report” for “employment purposes.” On the other hand, Title VII has been construed to prohibit what the Fair Credit Reporting Act allows.

#### *1. The Fair Credit Reporting Act*

The Fair Credit Reporting Act (“FCRA”)<sup>17</sup> specifically allows a consumer reporting agency to furnish a consumer report to an employer who “intends to use the information for employment purposes.”<sup>18</sup> “Employment purposes” expressly includes using the consumer report “for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.”<sup>19</sup> Importantly, the FCRA also requires

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16. UTAH CODE ANN. § 53-5-202(8) (1997).

17. 15 U.S.C. §§ 1681a-u (1997).

18. 15 U.S.C. § 1681b(3)(B) (1997). Amendments to FCRA which take effect on October 1, 1997 will require an employer to obtain authorization from a job applicant or employee before requesting a credit report. § 1681b(2) (1997).

19. 15 U.S.C. § 1681a(h) (1997).

an employer to advise job applicants "whenever . . . employment . . . is denied . . . either wholly or partly because of information contained in a consumer report from a consumer reporting agency."<sup>20</sup> When credit information adversely impacts an applicant in the hiring decision, the employer must furnish the applicant with the name and address of the consumer reporting agency which provided the credit report and advise the applicant that employment was denied either wholly or partly because of information contained in the report.<sup>21</sup> Thus, when examined under the statutory regime of the FCRA, it seems clear that obtaining a credit report on a potential employee is *permissible*, so long as the disclosure requirements of the FCRA are satisfied. Violation of the FCRA gives rise to a private cause of action on behalf of the person who is the subject of the credit report and allows recovery of actual damages, punitive damages and attorney fees.<sup>22</sup>

## 2. *Title VII's Restrictions*

As construed and applied by the EEOC, Title VII *prohibits* evaluating the credit standing of job applicants in connection with hiring decisions because considering credit information has a disparate impact on women and minorities. EEOC decisions regarding this practice are not numerous; however, the prohibition has been consistently recognized. Additionally, the prohibition has been recognized and applied in the context of job positions where personal integrity is at a premium, such as bank tellers.<sup>23</sup> Even more importantly, EEOC decisions have not required specific data regarding the proportion of minorities vis-a-vis Caucasians with poor credit records in the area from which the employer draws the work force. Rather, the existence of a disparate impact is deemed present based upon Census Bureau figures establishing that the percentage of minority populations with poor credit history is greater than the percentage of non-minority populations with poor credit history. This inference, considered with the consistency of the EEOC's interpretation of Title VII, requires the conclusion that a practice of using credit reports to distinguish among job applicants would likely be found to violate Title VII.

Additionally, it should be noted that the Utah Labor Commission's regulations specifically prohibit inquiry into a job applicant's credit history. Regulation R560-2-2, which constitutes the Commission's Pre-employment Inquiry Guide specifically states as follows: "It is generally prohibited to inquire as to bankruptcy, car ownership, rental or ownership

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20. 15 U.S.C. § 1681m(a) (1997).

21. See 15 U.S.C. § 1681m(a) (1997).

22. See 15 U.S.C. § 1681n (1997).

23. See EEOC Decision No. 72-1176 (1972).

of a house, length of residence at an address, or past garnishment of wages as poor credit ratings have a disparate impact on women and minorities."<sup>24</sup>

### 3. *FCRA v. Title VII: What to Do*

The interaction between the FCRA and Title VII creates a dangerous result: compliance with the FCRA's disclosure requirement is a virtual concession that Title VII has been violated. On the other hand, failure to notify an applicant that consideration of a credit report impacted the hiring decision results in a statutory violation of the FCRA. The following suggestions should be considered:

- Employers should not obtain personal credit reports to evaluate individuals for employment or promotion without an opinion from employment counsel that a valid "business justification" exists.
- When such an opinion is rendered, the employer should confirm that employment counsel's malpractice premiums are current.

### C. *Utah Drug and Alcohol Testing Statute vs. the ADA*

The design and implementation of any drug and alcohol testing policy must conform with the Utah Drug and Alcohol Testing Act ("Utah Act").<sup>25</sup> The Utah Act is generous with respect to the conditions under which testing may occur and protective to employers with respect to immunities provided when the specified procedures of the Utah Act are followed. However, the Utah Act specifically authorizes employers to engage in conduct which is prohibited by the Americans With Disabilities Act ("ADA"). Some of the tensions which exist between the Utah Act and the ADA are discussed below.

#### 1. *Pre-employment Alcohol Testing*

The Utah Act specifically authorizes "an employer to test employees or prospective employees for the presence of drugs or alcohol . . . as a condition of hiring or continued employment."<sup>26</sup> In contrast, alcoholism is a protected disability under the ADA.<sup>27</sup> The ADA does exempt from its

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24. UTAH ADMIN. CODE R560-2-2(W) (1997).

25. UTAH CODE ANN. §§ 34-38-1 to -15 (1997).

26. UTAH CODE ANN. § 34-38-3 (1997).

27. *Miners v. Cargill Communications, Inc.* 113 F.3d 820, 823 n.5 (8th Cir. 1997).



protective aegis an "applicant who is currently engaging in the illegal use of drugs," but does not allow discrimination based upon the legal use of alcohol.<sup>28</sup> The ADA does allow an employer to prohibit the use of any alcohol "at the workplace," and requires that employees not be under the influence of alcohol at the workplace.<sup>29</sup> However, the ADA does not permit *pre-employment* alcohol testing. Under the ADA, a pre-employment alcohol test is an impermissible "medical examination." Under the ADA, a "medical examination" is only permitted after a conditional offer of employment has been extended and only when all entering employees in the same job category are subject to the examination.<sup>30</sup> Including alcohol testing as part of a routine applicant screening program violates the ADA.

## 2. *Drug Testing*

The Utah Act permits drug testing of prospective employees and does not limit testing to "illegal drugs." Thus, under the Utah Act, an employer who obtains raw data from its testing agent does not risk a violation of the Utah Act. In contrast, the ADA restricts pre-employment drug testing to "illegal drugs." As a result, employers must exercise great caution to ensure that information received from a drug testing service is limited to illegal drugs for which the applicant does not have a valid prescription. Any information beyond this would constitute an impermissible medical examination under the ADA. For example, a Utah employer who discovers in the context of pre-employment drug screening that an applicant has AZT in his or her system does not risk a violation of the Utah Act. However, obtaining such information would constitute a violation of the ADA.

## 3. *Requirement of a Written Testing Policy*

The Utah Act requires that testing must be carried out "within the terms of a written policy which has been distributed to employees and is available for review by prospective employees."<sup>31</sup> Many Utah employers fail to make the important distinction between a drug and alcohol *abuse* policy and a *testing* policy. A policy which prohibits employees from coming to work under the influence of drugs or alcohol does not permit an employer to conduct testing. In order to conduct drug or alcohol testing, the employer must have a specific *testing* policy which incorporates

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28. 42 U.S.C. § 12114(a) (1994).

29. 29 C.F.R. § 1630.16(b) (1997).

30. 42 U.S.C. § 12112(d) (1994).

31. UTAH CODE ANN. § 34-38-7 (1997).

the procedural protections of the Utah Act.<sup>32</sup> Failure to adopt such a testing policy not only results in a forfeiture of the immunities provided by the Utah Act, but may subject the employer to liability. In contrast, the ADA does not require that drug or alcohol testing be conducted pursuant to a written policy. In this situation, conduct which would be permissible under the ADA is specifically prohibited by the Utah Act.

#### 4. *Return to Work Agreements*

The Utah Act allows an employer wide latitude in designing discipline for an individual who fails a drug or alcohol test. Included among the employer's options are: (1) a requirement that the employee enroll in a rehabilitation or counseling program, which may include additional drug or alcohol testing as a condition of continued employment; (2) suspension of the employee with or without pay; (3) termination of employment; (4) refusal to hire a prospective employee; or (5) other disciplinary measures in conformance with the employer's usual procedures.<sup>33</sup> Many employers design specific "Return to Work Agreements" pursuant to which an employee who has tested positive for drugs returns to work. These agreements are designed to ensure that the employee remains free from the influences of drugs or alcohol over a specified period, and frequently will include imposition of counseling requirements and testing at more frequent intervals. Though expressly permitted by the Utah Act, this practice is likely violative of the ADA. The ADA exempts from its protections only individuals who are "*currently* engaging in the illegal use of drugs."<sup>34</sup> An individual who is participating in a rehabilitation program and who is no longer engaging in illegal drug use is within the ADA's protection. As a result, an employer who takes advantage of the privilege in the Utah Act of requiring employees undergoing rehabilitation to submit to a Return to Work Agreement risks a discrimination claim under the ADA.

#### 5. *Utah Drug and Alcohol Testing vs. the ADA: What to Do*

Given the tensions that exist between the Utah Act and the ADA, the following suggestions should be considered:

- Coordinate closely with the entity who performs drug and alcohol testing to ensure that *pre-employment* testing results

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32. For a description of the required procedures, see UTAH CODE ANN. § 34-38-6 (1997).

33. See UTAH CODE ANN. § 34-38-8 (1997).

34. 42 U.S.C. § 12210(a) (1994) (emphasis added).

are limited to illegal drugs for which the individual does not have a valid prescription.

- Post-employment results should be limited to alcohol and illegal drugs for which the individual does not have a prescription.
- Exercise caution when implementing a Return to Work Agreement. Once an individual begins rehabilitation, imposition of such a return to work agreement may violate the ADA.

#### *D. IRS W-2 Requirements vs. Immigration Reform and Control Act*

##### *1. IRS W-2 Requirements*

In connection with the completion of IRS Form W-2, IRS Circular E — Employer's Tax Guide — an employer is directed to "record the name and number of each employee exactly as they are shown on the employee's social security card."<sup>35</sup> The employer is required to ensure that the name and social security number on the employee's social security card *exactly* match the employee's name and social security number on Form W-2.<sup>36</sup> The IRS instructions for Form W-2 specifically direct an employer to "ask to see each new employee's social security card."<sup>37</sup> Once the degree of non-conformity between employees' W-2's and social security cards exceeds ten percent of the employer's work force, the IRS assesses a fifty dollar penalty for each non-conforming W-2 up to \$100,000.<sup>38</sup>

##### *2. Immigration Reform and Control Act Document Abuse Restrictions*

The Immigration Reform and Control Act ("IRCA") requires an employer to ensure that each applicant is eligible for work in the United States.<sup>39</sup> Documentation must be provided affirming the identity and employment eligibility of each prospective employee.<sup>40</sup> Form I-9 provides a list of acceptable documents which may be furnished in order to establish identity and eligibility. However, the IRCA imposes stringent anti-docu-

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35. IRS Pub. 15 at 5 (January 1996).

36. *See id.* at 11.

37. *Id.*

38. *See id.*

39. 8 U.S.C. § 1324a(a)(1), (2) (1994).

40. *See* 8 U.S.C. § 1324a(b)(1) (1994); 8 C.F.R. § 274a.2 (1996).

ment abuse restrictions designed to ensure against national origin discrimination.<sup>41</sup> These restrictions prohibit an employer from specifying which of the many documents or combination of documents may be provided by an applicant in order to establish identity and employment eligibility.<sup>42</sup> The most common practice for applicants is to provide a driver's license, which establishes identity, and a social security card, which establishes employment eligibility. However, an employer who directs an applicant to provide these documents violates the anti-document abuse provisions and is subject to a penalty of up to \$1,000 for each instance in which the anti-document abuse provision is violated.<sup>43</sup>

### 3. *IRS vs. IRCA: What to Do*

The interaction between the requirements of the IRS with respect to examining an applicant's social security card and the IRCA's restrictions against requiring production of a social security card places employers in a difficult position. According to the Civil Rights Division of the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices, the following steps should be followed so as to comply with the requirements of the IRS without violating the IRCA:

- Do not tell applicants to bring their driver's license and social security card.
- Complete the I-9 process *before* obtaining information for completion of Form W-2.
- *After* the I-9 process is complete, you may require the applicant to show his or her social security card to verify that the name and social security number on Form W-2 exactly match the applicant's social security card.
- As long as the I-9 process is completed before an individual is required to produce their social security card, and as long as the individual is free to produce any document or combination of documents which satisfies the identity and employment eligibility requirements of IRCA, then the Department

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41. 8 U.S.C.A. § 1324b(a)(6) (Supp. 1997).

42. See 8 U.S.C.A. § 1324b(a)(6) (Supp. 1997).

43. See 8 U.S.C. § 1324b(g) (1994).

of Justice will not consider a requirement that the social security card be produced as a violation of IRCA.<sup>44</sup>

*E. Americans with Disabilities Act vs. Common Law Liability  
Related to Workplace Violence*

As the incidents of workplace violence continue to increase, employers are experiencing increasing apprehension as to how to obtain information predictive of individual acts of violence in the workplace without violating the ADA and how to discharge their common law obligations related to workplace violence. Again, an employer's restrictions with respect to obtaining and acting on relevant information under the ADA and its obligation to discharge common law obligations conflict.

*1. Restrictions Under the ADA*

The ADA protects individuals with a physical or *mental* impairment that substantially limits one or more major life activities.<sup>45</sup> Mental, emotional and psychological disorders within the protective aegis of the ADA include depression, paranoia, bi-polar disorder, anxiety disorders, schizophrenia and personality disorders.<sup>46</sup> The ADA's reasonable accommodation requirements apply to individuals impaired by these conditions. When combined with certain personality orientations, some psychological disorders present an increased risk of violent behavior. However, predictions of violent behavior, even by skilled mental health professionals, are unreliable at best.<sup>47</sup> This fact places employers in a difficult position. In order to remove a qualified individual with a disability from the protection of the ADA, the individual must present a "direct threat" to the health or safety of the individual or others in the workplace.<sup>48</sup> According to EEOC guidelines, the risk presented by the individual must be supported by evidence which is specific, objective, significant and current.<sup>49</sup> A remote risk or threat is inadequate. As a result, it is difficult to classify

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44. Letter from William Ho-Gonzalez, Special Counsel for Immigration Related Unfair Employment Practices, United States Department of Justice, Civil Rights Division, to Steven Bednar (August 31, 1995) (on file with the author).

45. 42 U.S.C. § 12102(2)(A) (1994).

46. See EEOC Enforcement Guidelines: Psychiatric Disabilities and the ADA (March 25, 1997).

47. See Steven C. Bednar, *The Psychotherapists Calamity: Emerging Trends in the Tarasoff Doctrine*, 1989 B.Y.U. L. REV. 261, 278-80.

48. 42 U.S.C. § 12113(b) (1994).

49. See EEOC Enforcement Guidelines: Psychiatric Disabilities and the ADA (March 25, 1997).

an individual with a mental disability within the "direct threat" exception. Taking adverse employment action against an individual who cannot be classified within the exemption creates a risk of liability for discrimination under the ADA.

## 2. *Common Law Liability Related to Workplace Violence*

Employers must be aware of at least two sources of liability for incidents related to workplace violence. The first area involves the negligent employment torts of negligent hiring, negligent retention and negligent supervision. An employer's duties with respect to negligent employment have been previously discussed.<sup>50</sup> When a threat of workplace violence is perceived, an employer's need to obtain an individualized assessment of the risk of violence created by an employee is pitted against the ADA's restrictions on conducting a "medical examination" during employment.

The problem for employers is that the threshold for common law liability for the violent acts of employability is "foreseeability."<sup>51</sup> Yet, under the ADA, the "direct threat" exception does not apply unless the risk of harm is specific, objective, significant and current. Violence is typically "foreseeable" long before it is specific, objective, significant and current. As a result, "foreseeability" for purposes of common law liability arises well before the individual presents a "direct threat" under the ADA. Here, the intersection of common law obligation and statutory restriction is a precariously dangerous one to cross.

A second area of potential liability relates to the breach of the duty to warn prospective employers who desire reference information on individuals with a known propensity for violence. In this instance, the walls of liability again close from both sides. The disclosure of false or private information creates a risk of a claim for defamation, public disclosure of private facts, or invasion of privacy.<sup>52</sup> Yet, employers are becoming increasingly subject to suits and liability for failure to disclose information which would have put a prospective employer on notice that an applicant presented a risk to the prospective employer.<sup>53</sup> The passage of the Utah Employee Reference Immunity Act,<sup>54</sup> which became effective May 1, 1995, offers immunity to employers who provide information to a prospective employer when reference information is solicited by a prospective employer. However, this statute is itself a two-edged sword because

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50. See *supra* Section II. A.

51. *C.C. v. Roadrunner Trucking Co.*, 823 F. Supp. 913 (D. Utah 1993).

52. For a discussion of Utah law summarizing standards governing privacy torts, see *Cox v. Hatch*, 761 P.2d 556 (Utah 1988).

53. See UTAH CODE ANN. § 34-42-1 (1997).

54. *Id.*

the provision of limited immunity for providing reference information arguably enhances an employer's obligation to convey information rather than to merely provide a neutral reference.

### 3. *ADA vs. Workplace Violence: What to Do*

Considering the numerous tensions that exist between the ADA and issues surrounding workplace violence, the following suggestions should be considered:

- Carefully assess all available information which can be permissibly obtained regarding the existence of a mental or emotional impairment.
- Determine whether there is a disclosed or known ADA covered condition.
- Determine whether there are obvious symptoms of an ADA covered condition.
- Carefully assess the risk of violent conduct by conducting an individualized risk assessment.
  - Is there a known history of violence?
  - Are there any specific threats?
  - Is there any evidence of alcohol or drug use?
- Require your employment counsel and mental health professional to demonstrate the legitimacy of their billing rates.

### III. CONCLUSION

The proliferation of employment regulations has created numerous situations of unavoidable peril for employers. Employment laws no longer exist as individually wrapped sticks of gum that may be discreetly analyzed. More than ever, human resource managers and employment counsel are in the position of having to be familiar with and view the entire spectrum of employment regulations when providing counseling or advice. The web of employment regulation is interconnected, conflicting, and sometimes creates mutually incompatible obligations. Human resource managers confront a frustrating maze where each answer creates a

new problem. The current state of affairs is aptly captured by a popular quote from Linus, the well-known friend of Charles Schultz' Charlie Brown:

We have not succeeded in answering all of life's problems. Indeed, we have not completely answered any of them. Our answers seem to have created a whole new set of questions. In many ways, we feel we are as confused as ever, but we believe we are confused at a much higher level and about more important things.